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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TROY ABEN MAKANSKI, Defendant and Appellant.	A150210 (Contra Costa County Super. Ct. No. 5-141259-2)

Defendant Troy Makanski appeals his conviction for attempted premeditated murder of a police officer, alleging discriminatory use of a peremptory challenge against a prospective juror. He also asks that we strike a court fee because his counsel was ineffective in failing raise a due process objection to its imposition based on his indigency. We see no error and no ineffective assistance.

We conclude the matter must be remanded, however, to allow the court to consider whether to strike the firearm enhancement under amended Penal Code section 12022.53, subdivision (h).[1] We also strike one of the prior prison term enhancements for lack of substantial evidence that he served prison time for a conviction in 2003.

Finally, to correct a miscalculation in the sentence, we shall direct that on remand Makanski be credited an additional five days in time served.

[1] Undesignated statutory references are to the Penal Code.

I. BACKGROUND

A. The Charges

The Contra Costa District Attorney filed a complaint that charged Makanski with (1) attempted premeditated murder of a peace officer (Brian Scott) (§§ 187, subd. (a), 664, subd. (f)); (2) attempted murder of a peace officer (Raychel Whedbee) (§§ 187, subd. (a), 664, subd. (f)); (3) assault on a peace officer with a semiautomatic firearm (Scott) (§ 245, subd. (d)(2)); (4) assault on a peace officer with a semiautomatic firearm (Whedbee) (§ 245, subd. (d)(2)); and (5) felon in possession of a firearm (§ 29800, subd. (a)(1)).

The complaint alleged an enhancement for intentional discharge of a firearm causing injury pursuant to section 12022.53, subdivisions (b) and (c), for counts one and two, and a firearm enhancement pursuant to section 12022.5, subdivision (a), for counts three and four. Finally, the complaint also alleged two enhancements pursuant to section 667.5, subdivision (b), for Makanski's service of prison terms for two prior convictions in 2003 and 2011.

B. The Evidence Presented at Trial

On the night of February 12th, 2013, police officers Brian Scott and Raychel Whedbee were patrolling in the Central Addition neighborhood of Pittsburg, California. At around 11:30 p.m., they noticed Makanski standing on the sidewalk near a Jeep with two other people. Because the neighborhood had a high crime rate and it was late at night, the officers worried that the group was planning to break into the Jeep.

After looping around the block and returning to find that Makanski and the other two people had not moved, the officers parked their car and approached the group. As the officers approached, Makanski backed away and then turned and fled. The officers pursued on foot until Makanski stopped and fired a gun at Officer Scott. The officers fired back, eventually incapacitating Makanski. The police then took Makanski into custody.

C. Verdict and Sentencing

The jury found Makanski guilty on counts one and three for attempted murder and assault of a peace officer with a semiautomatic firearm for his actions concerning Officer Scott and on count five for possessing a firearm as a felon. The jury also found that the firearm enhancement applied to counts one and three. The jury acquitted Makanski on counts two and four for his alleged actions against Officer Whedbee.

On count one, the trial court sentenced Makanski to a term of seven years to life, plus twenty years for the firearm enhancement (§ 12022.5). On count five, the trial court sentenced Makanski to a two-year term, to be served concurrently, and two one-year terms for his prior prison sentences pursuant to section 667.5, subdivision (b), to be served consecutively. The sentencing for count three was stayed pursuant to section 654. In total, Makanski was sentenced to a term of seven years to life, plus 22 years.

The court imposed a $176 probation report fee (§ 1203.1b) and attorney fees of $500 (§ 987.8) along with several other uncontested court fees. The defense attorney asked that the court waive the attorney fees because Makanski had no way to pay for them. The defense attorney then requested a hearing to assess Makanski's ability to pay the attorney fees. At the hearing the court waived the attorney fees. Makanski now contests the $176 probation report fee.

The court also awarded Makanski 1357 days of actual credit and 204 days of conduct credit towards his sentence. Appellant contests the number of actual days that should be credited towards his sentence.

II. DISCUSSION

A. *Wheeler*/*Batson*

1. Background

During jury selection, the prosecutor exercised his first peremptory challenge against Mr. G., a Hispanic man. Makanski's trial counsel raised a *Wheeler*/*Batson* objection to the peremptory challenge, arguing that the challenge was racially motivated. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.) Though a prosecutor's permitted reasoning for exercising a peremptory challenge is

exceptionally broad, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." (*Batson*, at p. 89.)

When the defense raises a *Wheeler*/*Batson* objection, the prosecutor's "use of peremptory challenges is presumed to be valid. The presumption is rebutted if the other party establishes a prima facie case that jurors were challenged solely on the basis of their presumed group bias." (*People v. Williams* (1997) 16 Cal.4th 153, 187.) Here, the trial court determined at the first step of the *Wheeler/Batson* analysis that a prima facie had been made out.

"Once a prima facie case has been shown, the burden shifts to the other party to provide race-neutral explanations for each of the disputed peremptory challenges." (*Williams, supra,* 16 Cal.4th at p. 187.) The prosecutor in this case explained that he exercised the challenge because the juror was covered in tattoos and had said in voir dire that he had been unlawfully pulled over by the police because he is Latino, has a lot of tattoos, and looks like a gang member.

The prosecutor stated that he was concerned about bias against law enforcement because he expected Makanski to argue he was unlawfully contacted by the police. In evaluating that defense, the prosecutor said, he thought Mr. G. might not be able to put aside his own past negative experiences with police in assessing the credibility of police witnesses in the case.

The trial court accepted the prosecutor's explanation as genuine and race-neutral and denied the *Wheeler*/*Batson* motion. Makanski now argues that the prosecutor's reasons were not race-neutral, so the conviction must be reversed. We disagree.

2. Standard of Review

"Review of a trial court's denial of a *Wheeler*/*Batson* motion is deferential, examining only whether substantial evidence supports its conclusions." (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) "We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges ' "with great restraint." ' [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to

distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*People v. Burgener* (2003) 29 Cal.4th 833, 864 (*Burgener*).)

3. Analysis

Having reviewed the voir dire transcript in detail, we conclude there is substantial evidence to support the trial judge's determination that the proffered reasons for excusing Mr. G. were non-pretextual. To justify exercising a peremptory challenge, the prosecutor cited Mr. G.'s tattoos and a "bad" experience Mr. G. reported having with law enforcement. Appellant contends that what the prosecutor referred to as a "bad" experience with law enforcement was, in fact, racial profiling.

According to the appellant, concern about a juror's experience of racial profiling can never be a racially-neutral reason for exercising a peremptory challenge. That argument is not without force, but the actual reason given by the prosecutor was that Mr. G claimed he had been unlawfully stopped, and, because the defense in this case was expected to involve arguments about unlawful police performance—with appellant claiming he was pulled over "for absolutely no reason"—"I cannot leave a juror on who has cited themselves as being unlawfully pulled over for whatever reason." Thus the proffered reason here was not racial profiling per se, but an attitude toward unlawful police conduct.

Based on the record presented, it appears to us that the trial court made a "sincere and reasoned effort to evaluate the nondiscriminatory justifications." (*Burgener*, *supra*, 29 Cal.4th at p. 864.) Because "[t]he existence or nonexistence of purposeful racial discrimination is a question of fact" (*People v. Lewis* (2008) 43 Cal.4th 415, 469) and "the trial court was in the best position to observe . . . the manner in which the prosecutor exercised his peremptory challenge," we will defer to the trial court's judgment and affirm the conviction. (*People v. Reynoso* (2003) 31 Cal.4th 903, 926.)

B. Probation Report Fee

Makanski advances two lines of argument for dismissal of the probation report fee. First, he claims the trial court violated section 1203.1b by not ordering a hearing to determine his ability to pay the fee. But "the burden [is] on the defendant to assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging the imposition of probation costs on appeal." (*People v. Trujillo* (2015) 60 Cal.4th 850, 858.) Makanski failed to raise any section 1203.1b objection at trial, so he is precluded from raising it on appeal.

Next, Makanski claims that his attorney's failure to object to the trial court's violation of 1203.1b was ineffective counsel, so the fee should be stricken. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694.)

The attorney's inaction does not constitute ineffective counsel because there is not a reasonable possibility that a court would have stricken the fee had defense counsel raised an objection. "[W]hen considering a claim of ineffective assistance of counsel, 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.' " (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

In a hearing to determine whether Makanski could afford to pay the attorney fees, the trial court found that he could not because he had no source of income and no savings. Notably, however, the statute defining a defendant's ability to pay attorney fees states that "a defendant sentenced to state prison . . . shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (§ 987.8, subd. (g)(2)(B).) A court cannot then consider prison wages in

determining a defendant's ability to pay attorney fees. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397.)

In contrast to section 987.8, subdivision (g)(2)(B), section 1203.1b, subdivision (e) is silent on the issue of whether prison wages may be taken into account in assessing whether a defendant can afford to pay for preparation of probation reports. Considering that the statutes are otherwise similar in defining a defendant's ability to pay, the omission indicates that the Legislature allows the trial court to consider prison wages in assessing a defendant's ability to pay a probation report fee. (Compare § 1203.1, subd. (e) with § 987.8, subd. (g)(2)(B).)

Because Makanski will spend the next several years in prison, a trial court would likely find him able to pay the fine out of his prison wages. Having found there is no merit to a section 1203.1b objection premised on the notion that it would have been improper for the court to consider Makanski's ability to pay out of prison wages, we conclude there was no ineffective assistance of counsel.

C. Amendment to Penal Code Section 12022.53, Subdivision (h)

After trial and sentencing in this case, Senate Bill 620 amended section 12022.53, subdivision (h), to allow a trial court the discretion to "strike or dismiss" a firearm enhancement in sentencing. Prior to that, imposition of the enhancement had been mandatory. Since the bill did not become effective until January 1, 2018, the trial court did not have the discretion to strike the firearm enhancement at the time of Makanski's sentencing. The amendment applies retroactively to this case because Makanski's judgment was not final when the bill took effect. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712.)

"[A] remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement" to give the trial court the discretion to strike the enhancement if it so chooses. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Respondent concedes that nothing in the record indicates that the trial court "would not in any event have stricken a firearm enhancement." (*Ibid.*) It is therefore appropriate to

remand the case to allow the trial court to consider striking the enhancement. We express no opinion regarding how the trial court should exercise its discretion.

D. 2003 Conviction

Section 667.5, subdivision (b), imposes an additional one-year sentence for each prior prison term that a defendant has served. The trial court relied solely on Makanski's rap sheet to determine that he had served prison terms for his two prior convictions. Respondent concedes, however, that the rap sheet does not indicate that Makanski served a prison term for the 2003 offense. The trial court did not admit any other evidence regarding Makanski's prior offenses. On this record, given respondent's concession, we shall direct that the prior prison term enhancement be stricken on remand.

E. Sentencing Credit for Days Served

The court awarded Makanski 1357 actual days of credit for the time he spent in presentence custody from the time of the incident on February 12, 2013 until his sentencing on November 4, 2016. The respondent concedes that 1362 days elapsed between February 12, 2013 and November 4, 2016. On remand for resentencing, Makanski should therefore be awarded five additional days of presentence credit.

III. DISPOSITION

The matter is remanded for resentencing consistent with this opinion. In all other respects the judgment is affirmed.

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STREETER, J.

We concur:

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POLLAK, P. J.

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TUCHER, J.

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